

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT HUNTINGTON

\_\_\_\_\_  
X  
:  
IN RE: : MDL NO.  
ETHICON, INC., : 2:12-MD-02327  
PELVIC REPAIR SYSTEM PRODUCTS :  
LIABILITY LITIGATION :  
:  
:  
:

\_\_\_\_\_  
X  
THIS DOCUMENT RELATES TO ALL CASES :  
\_\_\_\_\_  
X

**TELEPHONIC STATUS CONFERENCE  
BEFORE THE HONORABLE CHERYL A. EIFERT,  
UNITED STATES MAGISTRATE JUDGE  
TUESDAY, DECEMBER 15, 2015**

CATHERINE L. SCHUTTE-STANT, RPR, RMR  
Federal Official Court Reporter  
300 Virginia Street, East  
Room 6009  
Charleston, WV 25301  
(304) 347-3151

**APPEARANCES: (ALL VIA TELEPHONE)**

**FOR THE PLAINTIFFS: BRYAN F. AYLSTOCK, ESQ.**  
Aylstock, Witkin, Kreis & Overholtz  
Suite 200  
17 East Main Street  
Pensacola, FL 32502

**FOR THE PLAINTIFFS: LEE BALEFSKY, ESQ.**  
Kline & Specter  
The Nineteenth Floor  
1525 Locust Street  
Philadelphia, PA 19102

**FOR THE DEFENDANTS: PHILIP J. COMBS, ESQ.**  
Thomas, Combs & Spann  
P.O. Box 3824  
Charleston, WV 25338-3824

P R O C E E D I N G S

Had before The Honorable Cheryl A. Eifert, United States Magistrate Judge, United States District Court, for the Southern District of West Virginia, at Huntington, via teleconference, on December 15, 2015, as follows:

JUDICIAL ASSISTANT: Hi, this is Laura, Judge Eifert's Judicial Assistant. First, I would like to confirm the court reporter, Cathy, is on the line.

COURT REPORTER: Hi, Laura. This is Cathy.

JUDICIAL ASSISTANT: Hi, Cathy. Thank you.

We are here today in the matter of *Ethicon* MDL, Case Number 2:12-md-02327. This will be regarding Ethicon's motion for a protective order to quash cross-notice of videotape de bene esse deposition of Bruce Rosenzweig, M.D. This is ECF Number 1805.

May I please have plaintiffs' counsel?

MR. AYLSTOCK: Good morning, Laura. This is Bryan Aylstock on behalf of plaintiffs.

MR. BALEFSKY: This is Lee Balefsky on behalf of the plaintiffs in Pennsylvania.

JUDICIAL ASSISTANT: Thank you. If that's everyone for plaintiffs' counsel, may I please have counsel for Ethicon?

MR. COMBS: Laura, this is Phil Combs on behalf of Ethicon.

1 JUDICIAL ASSISTANT: All right, thank you. If  
2 everyone will please hold one moment for Judge Eifert.

3 THE COURT: Good morning.

4 RESPONSE: Good morning, Your Honor.

5 THE COURT: Well, I know we are here today for  
6 Ethicon's motion for protective order involving Dr.  
7 Rosenzweig, but I think I would also like to talk after that  
8 about the one involving Dr. Elliott, and also the errata  
9 sheet changes that are specific to the *Mullins* case. But  
10 why don't we get started with the first one, which is the  
11 motion in regards to Dr. Rosenzweig -- or is it Rosenzweig?

12 MR. COMBS: Rosenzweig, Judge.

13 THE COURT: Rosenzweig, okay. So who would like  
14 to speak about that on behalf of Ethicon?

15 MR. COMBS: Judge, this is Phil Combs. I'll be  
16 addressing this on behalf of Ethicon.

17 Judge, we've set forth our position in our papers and  
18 we basically have two complaints. The first is that the  
19 plaintiffs aren't following the procedures that are set  
20 forth in PTO 205; and the second is that the vehicle that  
21 they've chosen to cross-notice this deposition through  
22 prejudices us.

23 Judge Goodwin has already spoken on this, in PTO 205,  
24 he set an expert disclosure date for the plaintiffs for  
25 general and specific experts of February 1, 2016. And in

1 PTO 205, he specifically addresses that depositions of  
2 general causation experts are not to be duplicative, but  
3 that they shall be deposed once on the issue of their  
4 general causation reports.

5 So we have a situation here where we are being asked to  
6 depose Dr. Rosenzweig in a case in which we don't have a  
7 report in. I mean, there's no disclosure made in the MDL  
8 Wave 1, 2, or 3 cases. And plaintiffs say, "Well, that's  
9 okay, you already know what his opinions are going to be,"  
10 but that's not true. We don't have his report yet. And  
11 we're being forced to guess, at our peril, as to what his  
12 opinions are going to be. We don't know what they're going  
13 to ask him and we don't know what we're going to  
14 cross-examine him on.

15 Obviously, not all of the Wave cases involve TVT. And  
16 so we're also prejudiced by the vehicle of cross-noticing  
17 this in the *Carlino* case. That's a 2005 mechanically cut  
18 TVT case. And so all of a sudden we're being forced to  
19 cross-examine Dr. Rosenzweig in cases that involve TVT-O,  
20 TVT Secur, TVT Laser Cut, and TVT-O Laser Cut.

21 And, finally, as we pointed out in our reply brief,  
22 there are some real differences here. In Pennsylvania,  
23 there is a strong limitation on the ability to use learned  
24 treatises. And obviously that's one of the main ways that  
25 you cross-examine an expert witness is through the use of

1 learned treatises that disagree with his position. But if  
2 we do that in this deposition, like we would do in an MDL  
3 deposition, suddenly we've opened the door and plaintiffs  
4 can introduce learned treatises that they would otherwise  
5 not be able to introduce in the *Carlino* case.

6 So that's our position, Judge.

7 THE COURT: All right. Let me ask either you, Mr.  
8 Combs, or the plaintiffs' counsel. The deposition that is  
9 being taken in *Carlino*, my understanding from reading the  
10 materials is that this deposition is for evidence. Is that  
11 right?

12 MR. BALEFSKY: Yes, Your Honor. This is Lee  
13 Balefsky. I'm counsel for *Carlino* and also the plaintiffs'  
14 liaison counsel in Pennsylvania. I think there is a  
15 misstatement by Mr. Combs.

16 This deposition is being taken in all of the  
17 Pennsylvania litigation. It is a de bene esse deposition  
18 taken for every single trial that we will have in  
19 Pennsylvania, and it not only includes the *Carlino* case, but  
20 it includes another -- I think there's about 160 cases filed  
21 against Ethicon in Pennsylvania.

22 So the deposition was noticed for all of the cases in  
23 the general pelvic mesh litigation, and the deposition is  
24 being taken for all the different TVT products that Dr.  
25 Rosenzweig talked about in his generic report. It's a

1 generic deposition. It's not a case-specific deposition.  
2 So I think that's something that needs to be clarified  
3 initially.

4 THE COURT: So this is not being taken necessarily  
5 for use in a specific case; it's being taken in all the  
6 Pennsylvania cases and it may be used in those Pennsylvania  
7 cases as evidence?

8 MR. BALEFSKY: Correct. It's a generic -- he's a  
9 generic expert. He is not a case-specific expert. He  
10 doesn't comment on any case-specific materials regarding any  
11 -- any of the plaintiffs in Pennsylvania.

12 THE COURT: Okay.

13 MR. COMBS: And, Judge, this is Phil Combs. I  
14 think there are two points about that. The first is that we  
15 either already have or are in the process of objecting to  
16 that with Judge New in the Pennsylvania mass consolidated  
17 proceeding. And the second is that we would tailor our  
18 examination differently depending on the product at issue.

19 THE COURT: Right. I guess I do have a concern --  
20 I have two concerns about this deposition. One is that, my  
21 understanding is that this physician has not been disclosed  
22 yet as an expert in the Wave cases, Wave 1 cases or Wave 2  
23 cases and, therefore, no report has been produced on behalf  
24 of this expert in any of those cases.

25 Now, I understand the plaintiffs are saying, well,

1 they've had these other reports and they've had access to  
2 this testimony, so they, you know, they know what he's going  
3 to say and their argument that they're surprised is not  
4 valid. But the fact of the matter is that the rule requires  
5 that the report be provided before the expert is deposed.  
6 And it sounds to me as though this expert's not only not  
7 been identified, but he's not issued any specific report or  
8 even a docket of a prior report as a report that is going to  
9 apply in the MDLs? Is that a correct understanding?

10 MR. AYLSTOCK: Your Honor, this is Bryan Aylstock  
11 on behalf of the plaintiffs. As you're no doubt aware,  
12 PTO 205 reset the dates for the disclosure of experts and  
13 reports to February 1. So it is correct that, technically  
14 speaking, in the Wave cases, Dr. Rosenzweig has not issued  
15 or adopted a prior report, but that's form over substance,  
16 we would submit, in that his report -- and we'll  
17 represent -- is going to be entirely consistent and  
18 identical in all material respects to the reports he did in  
19 the *Lewis* case, which he testified in there, in trial in the  
20 *Huskey* case where he testified, the *Mullins* consolidation,  
21 which he was just -- which was just disclosed, and he was  
22 deposed on the *Ramirez* case, as well as in the *Carlino* case.

23 So it seems to me that if -- if -- and I would  
24 represent that I don't at all believe this will happen, but  
25 if for some reason he strays and Ethicon is surprised and it



1 comes out of the blue, even though he's given days and days  
2 and days of testimony and been subject to Daubert rulings  
3 and trial testimony, the remedy would simply be, Judge, this  
4 is outside of his prior reports and, therefore, don't allow  
5 it.

6 THE COURT: Well, Mr. Aylstock, let me ask you  
7 this, though: Have you not formally then adopted these  
8 prior reports as his reports in the MDL? Because my is  
9 understanding is it has not been done. He's not officially  
10 been identified, and his reports, although they've been  
11 produced in other cases, have not been adopted in these Wave  
12 cases.

13 MR. AYLSTOCK: Well, it's important to recognize,  
14 Your Honor, the wave process. And I'll go back to PTO 205,  
15 and specifically paragraph 3(a), each plaintiff in each  
16 wave -- and after today, there will be three waves,  
17 totalling 600 potential cases -- each plaintiff has to adopt  
18 no more than five experts, exclusive of treating physicians,  
19 in their case. And that is a process that's happened in the  
20 Bard waves as well, where a decision has to be made by each  
21 of plaintiffs' counsel as to which experts will be  
22 designated, and no more than five, which can be problematic.  
23 In most cases, you need a pathologist, you need a material  
24 scientist, you need a case-specific expert, potentially a  
25 regulatory expert, depending on whether the FDA issues end

1 up coming into the Fourth Circuit's law, life care planners,  
2 and of course general uro-Gyne experts.

3 So, in fact, it's the -- what PTO 205 specifically  
4 says, and I'm quoting, "It's the Court's expectations that  
5 these experts will overlap for plaintiffs who have the same  
6 products to some extent, if not entirely," end quote.

7 So it's not up to leadership to say, you have to use  
8 Dr. Rosenzweig, because they might choose -- each plaintiff  
9 can choose to use Dr. Rosenzweig or some other expert. But  
10 the reason that this is so important to the plaintiffs and  
11 really to the wave process generally is because when these  
12 cases go back, as Judge Goodwin indicated that they would if  
13 they weren't resolved, they're going to go back with an  
14 instruction to the trial court judge, the transferee court,  
15 set this case on your first available docket. And then we  
16 have one expert, which the Court recognizes will overlap or  
17 maybe more than one, but all being set for trial in  
18 relatively short order all over the country. And that would  
19 be impossible to deal with.

20 And so it's not yet time. There is no surprise. There  
21 is no prejudice as to what he will say. It will be the same  
22 thing that he's said repeatedly and the same substance of  
23 all of the reports. It's just a matter of form over  
24 substance in this case. And again, if, if we are wrong on  
25 that for some reason, they can come in here and complain

1 and -- and I'm sure they'll have a sympathetic ear from Your  
2 Honor. But they're not going to be wrong.

3 THE COURT: Well, the problem is, though, what are  
4 they going to complain about? Because, at this point, he's  
5 not formally adopted any of his reports as what you'd be  
6 using in Wave 1 and Wave 2 cases.

7 So there isn't anything for them to bring to the Court  
8 and say, here is the report that was identified in this case  
9 or in this wave of cases, and here is what he said. And you  
10 can see that what he says here is not the same or in  
11 addition to what he said in the report.

12 They can't really do that, because you haven't told  
13 them which report or reports -- I mean, obviously, those  
14 reports look pretty similar, but they don't cover all of the  
15 products. And they're not -- they've not really been  
16 identified in these cases. That's the problem that I have.

17 I understand what you're saying from a practical  
18 standpoint, Mr. Aylstock. He's testified multiple times; he  
19 says the same thing every time. You don't believe he's  
20 going to say anything different if he's deposed now, but if  
21 you look at the rule, the rule says that the expert must  
22 turn over their report before they're deposed. That's so  
23 that everybody knows going into the deposition what report  
24 it is that the expert is relying upon.

25 You haven't, to my knowledge, identified the report

1 that you're relying on for any of the various products. I  
2 don't know that those reports would be precisely the same  
3 for each of these products. They may be slightly different.  
4 I think that the -- I think Ethicon has the right to have on  
5 the record that Dr. Rosenzweig is going to be an expert and  
6 that this is the report he's going to be using in the TVT  
7 cases, the TVT-O cases, the TVT-S cases. I think they have  
8 a right to know that before they are forced to take his  
9 deposition.

10 MR. AYLSTOCK: Well, Your Honor, wouldn't they  
11 just be able to say, Dr. Rosenzweig's testimony varied from  
12 the Mullins report, the Huskey report, and the Lewis report  
13 in the following respects? Isn't it -- if we filed a notice  
14 today, adopting those opinions and reports, it's the, it's  
15 the same exact thing. I understand what Your Honor is  
16 saying, if he were to issue a new report with something  
17 different for these Wave cases or new, but that's not what's  
18 going to happen here. It's going to be consistent with this  
19 other report.

20 THE COURT: I don't think you're hearing what I'm  
21 saying. Right now there is no report in these Wave cases.  
22 There is no expert report. Because, even though this man  
23 testified in a lot of other cases, he's not been identified  
24 and has not supplied a report in any of these Wave cases.  
25 That's the problem. That's the technical problem.

1 But it's the rule. I'm not -- you know, I didn't just  
2 decide to make it up and say, I'm going to favor form over  
3 substance. It is a rule. That's the rule.

4 MR. AYLSTOCK: Well, could we not simply file  
5 something -- I mean, the deposition hasn't even happened  
6 yet. Why not file those -- a notice of adoption of his  
7 prior reports, and then there's -- then we've technically  
8 met the rule and there's no prejudice, Your Honor. Because  
9 his -- his testimony will be consistent with those reports.

10 THE COURT: All right. So, Mr. Combs, let's say  
11 that's what plaintiffs do, they file a notice saying, Dr.  
12 Rosenzweig will be an expert in some of the TVT-O cases,  
13 some of the TVT cases, some of the TVT-S cases, we know that  
14 and we're adopting these reports, and here they are. And  
15 these are reports that you've had for quite a while. So now  
16 how do you object to his deposition or why do you object?

17 MR. COMBS: Two problems, Your Honor. The first  
18 is, then the deposition is a week from today, and so we will  
19 be getting hundreds of pages of reports and we'll have to  
20 depose him on that in a week. The second is that to date he  
21 has not been disclosed in any TVT Secur cases, so we would  
22 have a completely new product we would have to get ready for  
23 in a week. And then the third is, again, we pointed out  
24 that this deposition is being taken under a different set of  
25 rules than are going to apply in the MDLs, and it's not a

1 form over substance argument here. There is a substantive  
2 difference between what we can do and what the plaintiffs  
3 can do in Pennsylvania and what we can do and they can do in  
4 the MDL. And we would have a very real prejudice.

5 You know, I witnessed some of the arguments between the  
6 parties and the things that happened in regard to Dr.  
7 Elliott's deposition. And there is a very real difference  
8 in what parties can do in Pennsylvania state court and the  
9 MDL.

10 THE COURT: Okay. So, here's -- I guess here's  
11 where I'm struggling with that issue. You know, on the one  
12 hand, we know that a lot of what he's going to say will be  
13 repetitive of what he would say if you took a completely  
14 separate deposition of him in the MDL. So you're talking  
15 about there being some differences in, primarily, it sounds  
16 to me like the use of medical literature in examining the  
17 witness. And, you know, the thought comes to my mind, well,  
18 can we not agree that this deposition will be taken based on  
19 these reports that are adopted that Ethicon has had for some  
20 time, which may then exclude the TVT-S, and then still allow  
21 Dr. Rosenzweig to be deposed on noncumulative matters like  
22 the medical literature once he's been identified in the MDL  
23 cases?

24 MR. BALEFSKY: Your Honor, Lee Balefsky.  
25 Regarding the Pennsylvania rule, there is that slight

1 difference that your expert cannot introduce and read from a  
2 learned treatise in Pennsylvania, although he can be asked  
3 about it and he can refer to it.

4 In terms of the Elliott deposition, which I'm very  
5 familiar with because we just played it in court here in the  
6 *Hammons* case, which is on trial right now in the  
7 Philadelphia Court of Common Pleas, there was no problem  
8 making sure that the deposition was in compliance with  
9 Pennsylvania laws, which was -- actually it's more  
10 restrictive, as I indicated, than the federal rule. And it  
11 was very easy for the defense, for Ethicon to edit out those  
12 portions of the, either the direct or the cross that they  
13 did not want played in Pennsylvania.

14 So I don't think the prejudice is there as Mr. Combs  
15 states.

16 MR. COMBS: Judge, you know, you have to remember  
17 what we're talking about here. I mean, we're talking about  
18 cross-examining a general causation expert with learned  
19 treatises. That's how you do it. I mean, that's the way  
20 you cross-examine a general causation expert. And for there  
21 to be a very substantial difference between the two systems  
22 in that regard, it's really a problem. And I was involved  
23 in the discussions between the defense team and the lawyer  
24 that took Dr. Elliott's deposition. And I can tell you that  
25 we were really faced with very difficult strategic

1 decisions.

2 I mean, as Your Honor knows, when you're crossing a  
3 general causation witness, that's what you do. I mean,  
4 you're putting up the medical literature and you're saying  
5 you have Opinion A, and these articles have come to a  
6 different conclusion. And having a real distinction between  
7 the two systems in that regard is a real problem for us.

8 MR. BALEFSKY: Your Honor, Lee Balefsky. There's  
9 no -- there's no distinction in cross-examination. I mean,  
10 they can use the learned treatises or they don't have to use  
11 the learned treatises.

12 THE COURT: Well, what I understand them saying is  
13 that under Pennsylvania rule the plaintiffs can't use them.  
14 The defendants can use them on cross-examination, but if the  
15 defendant uses them on cross-examination, that opens the  
16 door for the plaintiffs to use medical literature on  
17 redirect.

18 MR. BALEFSKY: Right.

19 THE COURT: Which would be a strategic difference  
20 there between how you might approach it.

21 MR. BALEFSKY well, Your Honor, it was not a  
22 problem in the *Elliott* case from what I saw that was right  
23 here in Pennsylvania. They were able to distinguish between  
24 what was -- what they wanted played and what they didn't  
25 want played. So if they wanted a learned treatise cross to



1 be played, it was played. And then we had the opportunity  
2 to do a redirect on it. But if they didn't want it played,  
3 it wasn't played, and therefore there was no redirect on it.

4 So, I mean, it seems to me the problem is more for the  
5 plaintiffs than it is for the defendants in terms of the  
6 MDL, where we -- where it can be used, but it can't be used  
7 here in Pennsylvania.

8 THE COURT: All right.

9 MR. COMBS: Judge, but it would be a problem for  
10 us, because there were specific articles that we would have  
11 liked to cross Dr. Elliott on that we did not use to cross  
12 him on.

13 THE COURT: Well, but what I hear -- what I hear  
14 the plaintiffs saying is that you have the option to cut --  
15 you could put that in your cross, but you'd also have the  
16 option to cut that out, cut all of that out. And if you cut  
17 it all out in Pennsylvania, then they can't redirect on it,  
18 because you're not offering it.

19 MR. COMBS: I don't agree, Judge. I mean, it's a  
20 trial deposition. We didn't ask him -- we did not ask him  
21 questions about literature we would have asked him about in  
22 the MDL.

23 THE COURT: Well, what I hear the plaintiffs  
24 saying, though, is that -- so you get your video recording  
25 of the deposition, and you say, Ethicon says, we're going to

1 cut all of this cross-examination out where we've asked him  
2 about the medical literature. And by cutting it all out,  
3 then they can't redirect on it.

4 Are you saying you're not allowed to cut it out? Is  
5 that what you're saying? And so once you've said it, you're  
6 stuck with it, or -- I don't really understand how it's  
7 working in the Pennsylvania court.

8 MR. BALEFSKY: Lee Balefsky. What's working is  
9 that each deposition, and specifically with the Elliott  
10 deposition, they -- each side goes through the -- because  
11 they're long depositions and the Judge has ordered that you  
12 cut down -- so we've been going through each deposition and  
13 cutting them down. And with Elliott, we did the same thing.  
14 And, you know, we can't insist that a cross be played if the  
15 defense wants to cut it out.

16 THE COURT: Well, I mean, I guess you could agree,  
17 you could enter into some sort of stipulation or agreement.  
18 But now, you know, here I'm talking about the Pennsylvania  
19 court, so it's not really something that I can do or that I  
20 could enter. But you could reach an agreement that if --  
21 because it sounds to me like the major strategic difference  
22 is this whole, this whole thing about the use of the medical  
23 literature. If you could agree that, that Ethicon would be  
24 permitted to withdraw any cross-examination based on  
25 literature, then I don't see what -- what real damage there

1 would be to Ethicon to go forward with the deposition of  
2 this physician. And, of course, you know, the point is that  
3 we want to try to streamline discovery to the extent that we  
4 can.

5 Having said that, I do believe that Ethicon has a right  
6 to know what reports are going to be used; if they're new  
7 reports, then they might have a right to have some more time  
8 to process those reports. It sounded to me like this is all  
9 old news; that there's really nothing this man is going to  
10 say that he hasn't already said. And he said it years ago.

11 So it doesn't sound to me like Ethicon should need a  
12 lot of time, except, you know, where products aren't  
13 addressed by him, or haven't been addressed in a report by  
14 him, I don't think you should have to cross-examine him on  
15 that. He needs to produce a report.

16 For example, on the TVT Secur, if he hasn't produced a  
17 report on that that you can adopt, and it hasn't been out  
18 there for awhile, then I don't think that -- I think they  
19 should get another shot at deposing him about that product.

20 MR. BALEFSKY: Your Honor, Lee Balefsky again. In  
21 terms of the Pennsylvania -- we produced a report in  
22 Pennsylvania which Ethicon has had for months which  
23 specifically addresses all three of those products.

24 THE COURT: Mr. Combs, I'm not real -- I'm not  
25 really persuaded by your argument that you're going to be

1 surprised or you don't have enough time to prepare, if in  
2 fact you've had the reports that they're going to adopt and  
3 rely on, you've had those now for some time. And, in fact,  
4 they -- this expert's appeared in cases that have gone to  
5 trial, so you've seen him, you've had an opportunity to  
6 cross-examine him. I'm not particularly persuaded that  
7 you're at any great disadvantage in that regard, as long as  
8 the plaintiffs do formally adopt the report, because I think  
9 that has to be done before the expert can be deposed.  
10 That's what the rule requires.

11 Now, on the issue of the medical literature, it seems  
12 to me that if you can reach an agreement that you can modify  
13 your cross-examination in the Pennsylvania cases and cut out  
14 the medical literature part, if you desire, then I don't see  
15 how you would be all that particularly prejudiced by that  
16 problem either.

17 MR. COMBS: Well, Judge, let's take them  
18 sequentially. So, for example, in regard to the report,  
19 what the plaintiffs have said in their response is that  
20 just, for example, for TVT Secur, that we're not going to be  
21 surprised by their opinion, because he addressed TVT Secur  
22 in the *Perry* case in California, which wasn't even a TVT  
23 Secur case. It was a TVT Abbrevio case.

24 THE COURT: Well, but he just said that there was  
25 a report produced in the Pennsylvania cases that you've had,

1 that Ethicon has had for some time now on TVT Secur. Is  
2 that correct?

3 MR. COMBS: Judge, it's in -- it's attached to the  
4 plaintiffs' response, and, you know, I mean the Court can  
5 look at it, there's not a disclosure on TVT Secur. Unless  
6 I'm just totally mistaken as to what has been produced.

7 MR. AYLSTOCK: Your Honor, this is Bryan Aylstock.  
8 Mr. Balefsky can speak to this, but my understanding is that  
9 there was a report, in fact, in this specific -- related to  
10 this specific deposition on TVT-S.

11 MR. BALEFSKY: I don't know what report you're  
12 talking about that was attached to the motion. Was it the  
13 Pennsylvania report?

14 The report that we filed here -- I don't have it in  
15 front of me, I'm sorry, Your Honor, I'm in court -- but the  
16 report that we filed here for the *Carlino* case and the *Magee*  
17 case, which is a TVT Secur case. The *Carlino* case is a TVT  
18 case, but the report was intended to apply to all of the --  
19 all of the potential TVT cases in Pennsylvania. It  
20 addresses the TVT, the TVT-O, and the TVT Secur.

21 So I can't quote from it right now because I don't have  
22 it in front of me, but I can represent that it addresses all  
23 three of those, all three of those products.

24 THE COURT: Well, I think the important point here  
25 is --

1 MR. COMBS: Your Honor, it's --

2 THE COURT: The important point is -- Mr. Combs,  
3 just wait a second.

4 MR. COMBS: I'm sorry, your honor.

5 THE COURT: The important point here is, have  
6 reports been produced on all of these products that he's  
7 going to testify about, and have they been produced in the  
8 past so that Ethicon has had them for some time so that you  
9 can -- you can comply with Rule 26, you can adopt those  
10 reports and say, this is what we're using for TVT, for  
11 TVT-Abbrevio, for TVT-O, for TVT Secur, this is the report  
12 from him? And as long as those reports had previously been  
13 given to Ethicon -- and by previously, I mean a while back,  
14 because they'd have a right to have some time to process  
15 them -- then I don't see how there's any real prejudice to  
16 Ethicon to go forward with the deposition. But what I  
17 can't -- I'm not clear on right now is, were reports  
18 produced for all of the products that he's going to testify  
19 about, and when were they produced? And I don't mean trial  
20 testimony, I mean reports.

21 MR. BALEFSKY: Your Honor, Lee Balefsky. The  
22 report in Pennsylvania, as I said, I don't have it in front  
23 of me. I can get it very quickly, though. I'm over here in  
24 court. I can get the information, on the date it was served  
25 and also the fact that it included all three of the products

1 that he's going to be discussing at the deposition.

2 THE COURT: Okay. So, Mr. Combs, if you've gotten  
3 all these reports and he tells you, here's the report on  
4 Secur TVT, whatever, and I suspect that probably a good part  
5 of those reports are the same or similar, then what is your  
6 prejudice as far as the reports go?

7 MR. COMBS: Okay. Judge, first, I'd like to  
8 address, the report that Mr. Balefsky is referring to is  
9 Exhibit 2 to the plaintiff's response. And it doesn't --  
10 you know, it may be that somewhere in a footnote it mentions  
11 the product TVT Secur, but -- the Court can review it, it's  
12 not a report on TVT Secur. It's Exhibit 2 to the response  
13 that was filed by the plaintiffs, Document 1811, Exhibit 2.

14 And so now, moving off the TVT Secur issue, I mean,  
15 again it's two things -- I mean, Judge, they're going --  
16 there have been hundreds of depositions taken in these  
17 cases. And there are going to be more. And I don't see how  
18 the plaintiffs can be prejudiced by providing us with a  
19 report in the MDL for him to be deposed upon the products  
20 that he's going to be a general causation expert on. And so  
21 to be doing it through Pennsylvania -- again, we'll have a  
22 limited amount of time to depose him, and all of a sudden  
23 we're going to be deposing him under two evidentiary  
24 standards, two admissibility standards regarding expert  
25 testimony; we're going to have to be deposing him in which

1 we are, you know, at some point saying, okay, we're going to  
2 use the literature for the MDL, but not for Pennsylvania.

3 And, you know, I just don't understand it, Judge. I  
4 mean, Judge Goodwin has told us, you can't depose these guys  
5 duplicatively for general causation. And that's fine and  
6 we're fine with that. But that's not what's going on here.  
7 I mean, this is a state court case in which we don't have a  
8 report. It's a week before the deposition. Some of the  
9 products aren't addressed. I'm making that representation  
10 to the Court that Exhibit 2 to the motion isn't a Secur  
11 deposition. And I don't see how the plaintiffs are  
12 prejudiced by putting forward Dr. Rosenzweig in the MDL one  
13 time as PTO 205 orders them to do.

14 And I know that we're prejudiced, because I've gone  
15 through the process by which we had to depose Dr. Elliott.  
16 And it's just not -- you know, it's just not accurate to  
17 say, oh, we can just make decisions to cut some of it out.  
18 I mean, we're going to, you know, be deposing him under a  
19 different evidentiary standard and different admissibility  
20 standard.

21 MR. AYLSTOCK: Your Honor, may I respond?

22 THE COURT: Yes.

23 MR. AYLSTOCK: Again, this is Bryan Aylstock on  
24 behalf of the plaintiffs. On the evidentiary point, there  
25 is nothing under the Pennsylvania rules that prohibits



1 cross-examination for learned treatises, so they get the  
2 same shot whether it's under the MDL or not. And as we've  
3 made clear, it's a simple matter of editing. It's happened,  
4 it's already happened in Elliott. And I'm sure Mr. Balefsky  
5 can accommodate in the same exact way for the MDL. So it's  
6 more of a technical matter on that issue.

7 On the issue of some sort of prejudice, I would just  
8 remind the parties that about a month ago we were before  
9 Your Honor on -- in a New Jersey deposition that actually  
10 had not even been cross-noticed in the MDL. It was on the  
11 IFU issues. And Marty Weisberg was put up by Ethicon to  
12 discuss those. And in that case, there were thousands and  
13 thousands of pages and documents that we hadn't even had a  
14 chance to look at. We were in the middle of trying to  
15 prepare for Mullins and then all of a sudden that got pushed  
16 off. But we simply had not had any time to look at them and  
17 they were produced literally at the last minute.

18 And what the Court did is to encourage us to  
19 participate, to attend, to be there, to streamline  
20 discovery, even though we hadn't been cross-noticed, because  
21 it was in the interest of justice to do the deposition once  
22 and we'd address any issues, if there were any, after the  
23 fact.

24 We complied with Your Honor's wishes. We attended the  
25 New Jersey deposition, even though we were not as prepared

1 as we would like to be. We did our best. And here we are  
2 today, and we're not -- I mean, I haven't fully analyzed the  
3 deposition, but I don't even believe we're going to need to  
4 go back on Mr. Weisberg until we -- you know, maybe there  
5 will be a document or such to go back to.

6 But I think the same thing applies here. Let's have  
7 the deposition, let's see what shakes out. If, in fact,  
8 there's some learned treatise that they didn't want to use  
9 in Pennsylvania that they used here, we'd just cut it out.  
10 And there is absolutely no prejudice in going forward,  
11 seeing what happens, and decisions can be made by the Court  
12 after the deposition occurs about what can be played in  
13 trial. This is, again, an expert whose already not only  
14 been deposed repeatedly, already made it through Daubert on  
15 his prior reports. And understanding the work that goes  
16 into all of the Daubert motions and so forth, it's not our  
17 intent to go rework something that's already been able to  
18 get through Daubert and get to trial and, frankly, have some  
19 verdicts in favor of the plaintiffs.

20 THE COURT: Well, I do feel that the point that  
21 Judge Goodwin is trying to make, and the point that's been  
22 made from the very beginning, is that to the extent  
23 possible, we should be doing the discovery, we should be  
24 coordinating with the state courts and we should be trying  
25 to get these witnesses that are repeated witnesses that have

1 general opinions, we need to just be deposing them one time.

2 I don't -- I think that if Ethicon has had the reports  
3 on the products -- and I can't tell from what I'm looking at  
4 here that there was ever a report produced on TVT Secur --  
5 but if there are reports on these various products and those  
6 reports are adopted and filed in the Wave 1 and Wave 2 cases  
7 or adopted in the Wave 1 and Wave 2 cases, and Ethicon has  
8 had them for some time, and this witness has testified  
9 before based on those reports, I don't think Ethicon is  
10 disadvantaged at all by going forward with this deposition.

11 I also think that if these evidentiary issues that  
12 arise in Pennsylvania, if there's a way to work around them,  
13 then we need to try to do that. And that doesn't mean to  
14 just cancel the deposition and don't go forward with it. I  
15 think we need to go forward with the deposition and figure  
16 out what we're going to do with these evidentiary issues.

17 You know, maybe you can all agree that Ethicon won't  
18 ask anything about the literature at the Pennsylvania  
19 deposition and come back later and do a very focused  
20 examination just based on the literature that can be  
21 interspersed into the video in some way.

22 I mean, obviously, you're taking videos that have been  
23 done on different days and you're putting them together for  
24 many of these witnesses, so it's not as though that would  
25 particularly stand out.

1           Another option would be, get into the deposition and  
2           you ask your medical literature things and you have some  
3           understanding or agreement with the plaintiffs that if you  
4           choose not to play that cross-examination, then it won't be  
5           played and there can't be any redirect with the medical  
6           literature.

7           I do agree with Mr. Balefsky, I think the plaintiffs  
8           are actually more prejudiced in that regard, because they  
9           can't use medical literature in their direct examination, as  
10          I'm understanding it. I wasn't really clear. I thought I  
11          heard Mr. Balefsky say, you're not allowed to read from it,  
12          but you can still ask them questions about it. Is that  
13          right?

14                 MR. BALEFSKY: That's correct, Your Honor.

15                 THE COURT: So actually you can use the  
16          literature, you just can't read to the jury from it, publish  
17          it in any way. But --

18                 MR. COMBS: Well, excuse me, Your Honor. As long  
19          as the expert says he relied on it in forming his opinion,  
20          then he can be asked to explain what significance that that  
21          piece of literature has to his opinions.

22                 THE COURT: If that had been on the direct, then  
23          Ethicon is going to have to use its medical literature on  
24          cross, I would think. You wouldn't have to, but --

25                 MR. Aylstock: And that's exactly what happened in

1 the Elliott deposition, there was a lot of medical  
2 literature used on cross under the Pennsylvania rules. So,  
3 again, I think it's something that can be addressed  
4 post-talk and we're happy to work with the other side to  
5 make that happen. We're just trying to get this done, so  
6 when these cases come back, we don't have one expert asked  
7 to be in four or five hundred trials all at the same time.

8 THE COURT: And I don't think you can keep making  
9 this person testify over and over and over again about the  
10 same thing. That's my concern.

11 MR. COMBS: I apologize, Your Honor. Were you  
12 finished?

13 THE COURT: Yes.

14 MR. COMBS: And certainly, we're not trying to do  
15 that. I mean, we understand PTO 205 and what it orders.  
16 And this isn't what it orders.

17 THE COURT: Well, PTO 205 -- Mr. Combs, PTO 205  
18 does not address this situation. It doesn't directly  
19 address this. What it says is, we don't want you to do the  
20 same depositions of the same people over and over and over  
21 again. If you've got witnesses who are going to be general  
22 witnesses on causation, for example, then you ought to do  
23 that witness one time and cover all of the products in that  
24 one deposition and don't do five different depositions.  
25 Don't keep repeating and repeating. Because a lot of what

1 the expert is going to say is going to be the same in each  
2 deposition. And I think that's the point of PTO 205.

3 It doesn't have anything directly to do with  
4 Pennsylvania or what's happening in Pennsylvania. It's  
5 talking about within the MDL, don't keep taking the same  
6 person over and over again. But --

7 UNIDENTIFIED SPEAKER: We completely agree with  
8 that.

9 THE COURT: But from the beginning of this  
10 litigation, though, from the very start of the litigation,  
11 Judge Goodwin made it very clear that, to the extent you  
12 could work with the states and coordinate your discovery,  
13 you needed to do that, because the judicial economy is not  
14 just in the federal court, it's in the courts across the  
15 country, all of the courts. There's no need to have the  
16 same person repeatedly deposed about the same subject and in  
17 the same type of cases. There's no need. And there's so  
18 many of these cases, it can't be done.

19 So if you were coming in here today, Mr. Combs, and you  
20 could really show me something that made me concerned that  
21 you were going to be prejudiced at this deposition, then I  
22 would agree with you, in that particular circumstance, we  
23 ought to separate the state from the federal, and you do  
24 your state thing and we'll do the federal thing later. But  
25 I'm not really hearing that.

1           What I'm hearing is this man's going to say the same  
2           thing; he's going to say the same thing he's already said;  
3           he's going to say the same thing he's said in all the  
4           reports he's already provided that Ethicon has had for a  
5           long time, and the only real difference I can see is this  
6           whole strategic issue about the medical literature, which  
7           you can work around.

8           Now, if there aren't reports on products like the TVT  
9           Secur, then I do not agree that this deposition would apply  
10          to Wave 1 and 2 cases involving TVT Secur, and Ethicon would  
11          have the opportunity to depose this expert on that product.  
12          I think they should have a right to have testimony opinions  
13          on each product. And if he's out in Pennsylvania, then  
14          that, that hasn't been covered. That wouldn't be  
15          cumulative. That wouldn't be. That would be different.

16          But I think to the extent he's going to be testifying  
17          about products and the plaintiffs adopt those reports, and  
18          you've had those reports, you can be prepared to cover those  
19          at this deposition.

20                 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

21                 THE COURT: In the case of Elliott, what happened  
22          with that one? Because I think that was filed like the day  
23          of the deposition or something, so I didn't really have a  
24          chance to do anything on that or look at that. Was that the  
25          very same issue?

1 MR. AYLSTOCK: Bryan Aylstock. It is, Your Honor.  
2 And the deposition did go forward. The cut was actually  
3 played in the Hammons trial that Lee's stepped out of right  
4 now, and understood that both sides made cuts and medical  
5 literature came in and he was crossed on it. The -- I guess  
6 the difference is, now we have the benefit of hindsight.  
7 And given where we were on scheduling and, frankly, Tom's  
8 team being in trial and my team preparing and helping with  
9 the other trials, I don't have a formal written response,  
10 which I'd like to do, because I think when you see and see  
11 the testimony in comparison, for example, to exactly what  
12 was asked in the *Bellew* case, and his expert report there,  
13 there's absolutely no surprise and no prejudice.

14 In fact, Adam Slater, who put on Dr. Elliott in *Bellew*  
15 is the same one who did the de ben esse of Dr. Elliott at  
16 the Hammons trial. He's in trial now. So I was hoping to  
17 have his input in the brief and potentially argue the case,  
18 if he's available to do so, before Your Honor.

19 But it's the same basic issue, Your Honor, in that,  
20 again, Dr. Elliott has been deposed again and again and  
21 again and testified now multiple times. And unlike Dr.  
22 Rosenzweig, which covers multiple products, the only product  
23 that -- and it was a general deposition -- the only product  
24 that Dr. Elliott covered was the Prolift in his report. His  
25 -- it was in *Bellew* and it will be the exact same report



1 that was disclosed in *Carlino*. There will be no difference  
2 whatsoever in his testimony or his report that they already  
3 had months and months prior to the depo.

4 MR. COMBS: And, Judge, I know you're tired of  
5 hearing me say this, but, yeah, his deposition was taken in  
6 *Hammons*, and there were many things that we didn't and  
7 couldn't do in that deposition, and we didn't.

8 THE COURT: Well, I think, Mr. Combs, if that  
9 turns out to be the case with Dr. Rosenzweig, then you can  
10 always make a motion to supplement his deposition, re-depose  
11 him for the MDLs, and we can address it then. But, but --  
12 at least at this point, you're not convincing me that  
13 there's any major prejudice from going ahead with the  
14 deposition. If -- if because this is for Pennsylvania and  
15 it is so bizarre, its law is just so bizarre that there is a  
16 whole series of questions you didn't ask because of that,  
17 then, after the deposition, bring it forward and we can talk  
18 about a supplemental deposition. I just don't want him to  
19 be saying the same things over and over and over again. And  
20 I think eight/ninths of the deposition he'll give in the  
21 deposition in Pennsylvania is going to be the same as what  
22 he would say in the MDL if you did it separately.

23 So I can't see any benefit to having that happen twice.

24 MR. COMBS: Well, and there's no question that  
25 we'll need to make that motion to have a second deposition

1 of Dr. Elliott.

2 THE COURT: Okay. Well, you make the motion. I'm  
3 not going to preclude you from doing that. And, also, I  
4 would not preclude Ethicon from taking a deposition of  
5 Elliott or Rosenzweig or whoever based on a product that  
6 they didn't have a report for. They have to have the report  
7 before they take the deposition. And I can't stress that  
8 enough. That is the rule.

9 I mean, we went through that I think just recently in  
10 another motion, where Ethicon wanted to take two depositions  
11 of the same person and his report hadn't been produced. And  
12 I believe the plaintiffs were objecting to the deposition  
13 going forward without the report having been produced. And  
14 I think that was a very legitimate point, because the rule  
15 says what the rule means, and it means the report goes out  
16 before you take the deposition. It's what it says.

17 So, so I think that's where we'll go with this. You  
18 make your motion on Elliott, you make your motion on  
19 Rosenzweig, if you believe you've been prohibited from  
20 asking a line of questions, those things can always be  
21 spliced into your video. I mean, those videos are pretty  
22 chopped up, are they not?

23 MR. COMBS: Well, they are, Your Honor.

24 THE COURT: So I don't think it would be real  
25 obvious. But I think we need to cross that bridge when we

1       come to it. The main point is to get as much of his  
2       testimony done as we can.

3             All right, the last thing then is this errata sheet  
4       issue. And I have looked at that. And, you know, I've  
5       looked at Judge Goodwin's decision in the *Holland* case. He  
6       very clearly says that you can make substantive changes. So  
7       what Dr. Vogel did was appropriate, according to the Holland  
8       case. The issue then becomes, if he makes these changes,  
9       should the other adverse party be entitled to do a  
10      supplemental deposition to explore the basis of the changes.

11            And I think that they -- that plaintiffs should be  
12      allowed to do that.

13            When I looked at the changes he made, four of them --  
14      there were six, there were six changes; two of them were  
15      just spellings. So four of them would be what you might put  
16      in the category of a substantive change. And I do -- I do  
17      see what the plaintiffs are saying about how the change in  
18      at least one of those circumstances changed the meaning,  
19      basically, of the question/answer exchange.

20            So, plaintiffs, I am going to give you the opportunity  
21      to reopen the deposition and ask Dr. Vogel about the changes  
22      that he made on the errata sheet to his testimony.

23            As far as payment for that, I'm not going to require  
24      Ethicon to pay for the deposition. I think in terms of  
25      whatever expert fee Dr. Vogel charges -- what has been your

1 standing arrangement on the expert fees?

2 MR. AYLSTOCK: Your Honor, this is Bryan Aylstock.  
3 We've typically just paid for our own expert time in  
4 deposition.

5 THE COURT: All right. So then Ethicon will pay  
6 the expert charges from Dr. Vogel for his time involved in  
7 attending that deposition. But, you know, that -- I don't  
8 know why you can't just do that deposition by telephone  
9 really or by video conference, because it doesn't sound like  
10 it's going to be a particularly long deposition. It seems  
11 like --

12 MR. AYLSTOCK: I don't disagree, Your Honor.

13 MR. COMBS: And, Judge, the original deposition of  
14 Dr. Vogel was taken by phone anyway.

15 THE COURT: Okay. So I don't see any point in  
16 shifting the costs for that. I think he's allowed to make  
17 changes according to the *Holland* case and you're allowed to  
18 ask him about those.

19 So that's how I'd rule on that one. And I'll do a  
20 short order just saying that the ruling was as discussed in  
21 the hearing today.

22 MR. AYLSTOCK: Thank you, Your Honor.

23 THE COURT: Okay. Is there anything else that we  
24 need to talk about today?

25 There was something else that I had in my mind as we

1       were talking and I've lost my train of thought. Is there  
2       anything you all can think of?

3               MR. AYLSTOCK: Your Honor, this is Bryan Aylstock.  
4       My only thing is I really need to get my wife a Christmas  
5       present.

6               THE COURT: That's not a bad idea.

7               MR. AYLSTOCK: Yeah. I don't have anything else,  
8       Your Honor.

9               THE COURT: Anything from Ethicon?

10              MR. COMBS: No, ma'am.

11              THE COURT: All right. Then thank you, Cathy. We  
12       appreciate it.

13              COURT REPORTER: Thank you, Judge.

14              THE COURT: And we are in recess.

15              MR. AYLSTOCK: Thank you, Your Honor.

16              MR. COMBS: Good-bye, Judge.

17              THE COURT: Bye-bye.

18              (Proceedings concluded at 11:55 a.m.)

19

20

21

22

23

24

25

## 1 CERTIFICATE OF OFFICIAL REPORTER

2 I, Catherine L. Schutte-Stant, Federal Official Court  
3 Reporter, in and for the United States District Court, for  
4 the Southern District of West Virginia, do hereby certify  
5 that the foregoing is a true and correct transcript of the  
6 stenographically reported proceedings held in the  
7 above-entitled matter.

8  
9 December 22, 2015

10  
11 /s/ CATHERINE L. SCHUTTE-STANT, RMR, CRR

12 \_\_\_\_\_  
13 CATHERINE L. SCHUTTE-STANT, RMR, CRR  
14 FEDERAL OFFICIAL COURT REPORTER  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25